

NEW WINESKINS FOR NEW WINE: THE NEED TO ENCOURAGE FAIRNESS IN MANDATORY ARBITRATION

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INTRODUCTION

When the Federal Arbitration Act ("FAA")¹ was passed in 1925, it constituted an important Congressional endorsement of arbitration as an alternative to litigation in court and a major departure from previous practice.² Specifically, the FAA made it possible for parties to enforce their arbitration agreements by orders of specific performance.³ While it broke new ground, the FAA was limited in its goals and ambitions. It did not, for example, oust the states from their role in regulating arbitration agreements, nor was it understood to extend to contracts to arbitrate either civil rights claims or claims arising out of employment relations.⁴ Beginning in 1985, the Supreme Court began radically reinterpreting the FAA.⁵ The Court announced an "emphatic federal policy in favor of arbitral dispute

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1. United States Arbitration Act of 1925, Pub. L. No. 25-401, ch. 213, 43 Stat. 883 (codified as amended at 9 U.S.C. §§ 1-307 (1994)).

2. Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, S. CT. REV. 1996, at 331-402. *Southland Corp. v. Keating*, 465 U.S. 1, 21 (1984) (O'Connor, J., dissenting) provides an account of the history of the FAA. That history is more fully recounted in IAN R. MACNEIL, *AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION* 15-133 (1992).

3. See IAN R. MACNEIL ET AL., *FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS, AND REMEDIES UNDER FEDERAL ARBITRATION* §§ 4.3, 5.3, 5.4 (1994, Supp. 1997).

4. Carrington & Haagen, *supra* note 2, at 344.

5. Paul Carrington and I have criticized this reinterpretation of the Federal Arbitration Act in Carrington & Haagen, *supra* note 2, at 331-402. See also Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L. Q. 637 (1996) [hereinafter Sternlight, *Panacea*]; Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1 (1997) [hereinafter Sternlight, *Fresh Assessment*].

resolution”⁶ and has proceeded in furtherance of that federal policy to embrace contractually based arbitration as a solution to a myriad of ills from overcrowded dockets to international sensitivities.⁷ The Court has upheld these agreements when imposed as a condition of employment⁸ and in adhesive consumer contracts.⁹ It has enforced them not only with regard to common law causes of action, but also as to statutorily based civil rights claims.¹⁰ Finally, it has taken from the states the authority to regulate these agreements except on such grounds as would apply to all contracts. The process of pouring the new wine of enthusiasm for alternative dispute resolution¹¹ into this sixty year old wineskin has predictably produced a mess.¹²

Responding to the authority conferred in these cases, employers have begun to require their employees;¹³ private schools to require their students;¹⁴ banks, insurance companies, and securities firms to require their customers;¹⁵ lawyers to require their clients;¹⁶ healthcare providers to require patients; and the providers of products and services to require consumers to give up their constitutional rights to go to court for redress of grievances and submit their claim to private dispute resolution. Industry newsletters¹⁷ and even federal judges¹⁸ now

6. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985).

7. *Carrington & Haagen*, *supra* note 2, at 332. In a recent opinion, Judge Coffey has even suggested the use of mandatory arbitration agreements as a solution to the problem of excessive bureaucracy and the “over-regulat[ion]” of American business and explained their use as a response to the erosion of American competitiveness. *Jansen v. Packaging Corp. of Am.*, 123 F.3d 490, 541 (1997) (Coffey, J., concurring in part and dissenting in part).

8. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

9. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995).

10. *Gilmer*, 500 U.S. at 33.

11. See Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?*, 11 OHIO ST. J. DISP. RESOL. 297 (1996).

12. See Luke 5:37-38 (“And no one puts new wine into old wineskins; or else the new wine will burst the wineskins and be spilled, and the wineskins will be ruined. But new wine must be put into new wineskins, and both are preserved.”).

13. See RICHARD A. BALES, *COMPULSORY ARBITRATION: THE GRAND EXPERIMENT IN EMPLOYMENT 2* (1997) (citing a General Accounting Office survey that 1.3% of employers have mandatory arbitration procedures in place).

14. *First Circuit: Private School Does Not Have To Readmit Suspended Student*, MANAGING SCH. BUS., Mar. 19, 1998, available in LEXIS, News Library, LRP File (referring to mandatory arbitration agreements as a “coveted line of defense for the private school”).

15. See Brad Bole, *As Arbitration Grows in Popularity, Courts Try to Curb Abuses*, 23 LITIGATION NEWS 3-4 (1998).

16. See Mark Momjian, *Enforceability of Mandatory Binding Arbitration Clauses in Retainers*, MATRIMONIAL STRATEGIST, July 1996, at 1.

17. See, e.g., *Operators Eye Arbitration Policies*, NATION'S RESTAURANT NEWS, Jan. 12, 1998, at 1.

18. See *Jansen v. Packaging Corp. of Am.*, 123 F.3d 490, 540-47 (1997) (Coffey, J., concurring in part and dissenting in part).

advise the laggards, who have failed to appreciate the significance of these decisions, to include mandatory arbitration agreements in their contracts. Employers now subject millions of their employees to these agreements.¹⁹ If those currently considering implementing such policies actually do so, they will soon subject millions more.²⁰

Not surprisingly,²¹ the power conferred on private parties to use mandatory pre-dispute arbitration clauses to avoid litigation in the courts has been abused.²² Given the structure of incentives, it could hardly be otherwise. The cost of imposing these clauses on the uncomprehending, the unaware, and the unwilling are too low, and the incentives to provide for arbitration procedures likely to be adequate to protect the legitimate interests of the aggrieved are too few.²³ Although it continues to be a strong supporter of voluntary arbitration, the Equal Employment Opportunity Commission ("EEOC") recently called the widespread

19. See *ADR News: AAA Initiates New Moves in Employment ADR*, 52 SUM. DISP. RESOL. J., Summer 1997, at 5 (noting that the American Arbitration Association was helping to administer the arbitration programs of 300 large corporations covering 3.5 million employees).

20. See *BALES*, *supra* note 13, at 2 (1997) (citing a General Accounting Office survey that 8.4% of employers are currently considering implementing such policies mandating arbitration of employee disputes).

21. See the warnings contained in the Brief of Amici Curiae of the Attorneys General of the States of Alabama, Alaska, Arkansas, Colorado, Florida, Hawaii, Illinois, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, North Dakota, South Carolina, Utah and Vermont, and the Commonwealths of Massachusetts and Pennsylvania, in support of respondents G. Michael Dobson and Wanda C. Dobson, *Gilmer v. Interstate/Johnson Lane Corp.*, 513 U.S. 265, 269 (1995) (No. 93-1001).

22. *Forced into Arbitration? Not Anymore*, BUS. WK., Mar. 16, 1998, at 66 (quoting George Nicolau, former President of the National Academy of Arbitrators: "Many employers have adopted [mandatory arbitration] plans [that] are quite unfair."). See also *Bole*, *supra* note 15, at 3 ("This environment has resulted in efforts to draft arbitration clauses that clearly favor one party or, although facially neutral, have the effect of favoring one side of the dispute."); L. M. Sixel, *Case Leads Employers to Rethink Arbitration Rules*, HOUSTON CHRON., Jan. 29, 1996, at D1 ("Starting about three years ago,....many employers adopted stiff self-serving arbitration rules...."); Leslie Kaufman & Anne Underwood, *Sign or Hit the Street: Want a Job? More and More Employers Require Workers To Agree Not To Take Them to Court*, NEWSWEEK, June 30, 1997, at 48 (citing the arbitration agreement that Circuit City has imposed on its employees that requires employees to arbitrate claims arising out of their employment but permits the company to go to court if it believes that it would be to its advantage).

23. Professor Samuel Estreicher, a strong supporter of pre-dispute agreements to arbitrate employment claims, acknowledges that at least some employers will be unwilling to subject themselves to neutral arbitration under procedures likely to be adequate to vindicate employees' statutory claims. Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. REV. 1344, 1349-51 (1997). A substantial percentage of employers are looking to these clauses to create strategic advantage, not a more efficient forum.

use of mandatory arbitration agreements in employment. "the greatest threat to Civil Rights enforcement" today.²⁴

Whether or not the widespread use of mandatory arbitration constitutes "the greatest threat to Civil Rights enforcement," it is widely perceived as unfair and has begun to provoke resistance. The use of "cram-down" arbitration²⁵ has fostered substantial hostility to ADR,²⁶ and there are at least some indications that this hostility is beginning to have an impact on the entire range of actors in this field. Some of those who had embraced mandatory arbitration as a solution to their problems have either have abandoned or are considering abandoning mandatory arbitration.²⁷ Some arbitral bodies have refused to accept certain classes of these arbitrations.²⁸ Congress is now considering legislation to limit the authority of parties to use contracts to impose arbitration.²⁹ State and federal courts have, moreover, begun to respond to particular instances of overreaching³⁰ by placing a variety of arguably inconsistent requirements on the resulting arbitrations.³¹

24. Terry Schraeder, *EEOC Continues To Fight Employer Arbitration*, 80 PIMA'S NORTY AM. PAPERMAKER, Jan. 1998, at 16, available in LEXIS, News Library, Curnws File. The objections of the EEOC are not, however, to arbitration as such. In fact, the Commission has strongly endorsed the voluntary use of arbitration that is both knowing and voluntary and designed to be fair and to safeguard statutory rights. See Pierre Levy, *Gilmer Revisited: The Judicial Erosion of Employee Statutory Rights*, 26 N.M. L. REV. 455, 478 n.193 (1996) (quoting Memorandum of Points and Authorities of the EEOC as Amicus Curiae, *Duffield v. Robertson Stephens & Co.*, No. C-95-0109-EFL, at 1 (D. Cal. filed Aug. 4, 1995)).

25. Carrie Menkel-Meadow, *Symposium on Alternative Dispute Resolution: When Dispute Resolution Begets Disputes of Its Own: Conflicts Among Dispute Professionals*, 44 UCLA L. REV. 1871, 1890 n.98 (1997) (citing the remarks of Wayne Outten, former president of the National Employment Lawyers Association).

26. *Id.* at 1890.

27. The NASD has recently voted to eliminate its mandatory arbitration requirement with regard to civil rights claims. The change will not become effective until approved by the Securities and Exchange Commission. See *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1186 n.1 (9th Cir. 1998).

28. Carrington & Haagen, *supra* note 2, at 372.

29. Reporting on these bills, Amy Zuber quotes the general counsel of the National Restaurant Association as saying: "There is no anticipation that [the bills] will go anywhere.... There is considerable resistance against regulating private agreements in the workplace. The basic approach these days is less government intrusion, not more." Amy Zuber, *Operators Eye Arbitration Policies*, NATION'S RESTAURANT NEWS, Jan. 12, 1998, at 1.

30. Bole, *supra* note 15, at 3-4.

31. See, for example, the different approaches taken to the related problems of arbitrator independence and arbitrator cost. In *Cole v. Burns International Security Services, Inc.*, 105 F.3d 1465, 1468 (D.C. Cir. 1997), the Court of Appeals held that where the arbitration was imposed on an employee by his employer as a condition of employment, the employer must bear the cost of the arbitrators' fees in order to remove the disincentive to bring a claim inherent in the expense of paying for the cost of the arbitration. In *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 995 F. Supp. 190, 208 (D. Mass. 1998), the court held that an arbitration in which one of the parties had no role in the selection of the arbitrators was impermissible. The court in *Cole* recognized the concern and

The Court's interpretation of the FAA is based on two mutually reinforcing assumptions. The first is that arbitration is a form of dispute resolution that is different from, but not inferior to litigation in the courts. The Court has stated that the purpose of the FAA was to overcome the courts' irrational hostility to this difference. Since 1985, it consistently has treated resistance to arbitration as a peculiarly unworthy species of bigotry. It located the hostility as originating "in ancient times," as part of the battle among the English courts over jurisdiction,³² and attributed the survival of rules attempting to limit or control arbitration to some atavistic attachment to the "antiquity of the rule" against arbitration clauses, rather than to "its excellence or reason."³³

The second is that the parties are the best judges of what is in their own interests, and having made a bargain they should not be allowed to avoid the consequences of it, except on the same grounds that would apply in the case of any other contract.³⁴ Because the choice of dispute resolution forum is not suspect, it is extremely difficult for a party seeking to challenge an agreement to arbitrate to prevail. Placing such a heavy burden on those resisting arbitration in most cases effectively disposes of the matter, encouraging parties with market power to engage in abusive behavior.³⁵

While it is extremely difficult to read the Supreme Court's jurisprudence in this area without feeling a sense that something has gone very wrong in the analysis,³⁶ it is probably misguided, as Chief Judge Harry Edwards, an early critic of the expansion of the FAA,³⁷ recently noted, "to mourn the Supreme Court's endorsement of the arbitration of complex and important public law claims."³⁸ For many classes of persons, including employees and consumers, a properly

reviewed both the academic literature that argues that arbitrators have a financial incentive to favor employers, because those employers are repeat players, and the empirical studies that attempt to demonstrate that bias. *Cole*, 105 F.3d at 1485 nn.16-17. It concluded that the source of the bias, if it exists, is not likely to be related to who pays, but rather to who selects. *Id.* at 1485.

32. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270 (1995) (citing *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 211 (1956) (Frankfurter, J., concurring) (quoting *United States Asphalt Ref. Co. v. Trinidad Lake Petroleum Co.*, 222 F. 1006, 1007 (S.D.N.Y. 1915))).

33. *Id.*

34. *Casarotto v. Doctor's Assocs. Inc.*, 517 U.S. 681, 685 (1996); *Dobson*, 513 U.S. at 281.

35. See Schreader, *supra* note 24, at 16.

36. See, e.g., *Armijo v. Prudential Ins. Co.*, 72 F.3d 793, 800 (10th Cir. 1995) (Jenkins, J., concurring: "I believe the case law interpreting the Federal Arbitration Act...has gotten far afield from Congress's original intent.").

37. Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 679 (1986) ("Imagine, for example, the impoverished nature of civil rights law that would have resulted had all race discrimination cases in the sixties and seventies been mediated rather than adjudicated.").

38. *Cole v. Burns Int'l Sec. Servs., Inc.*, 105 F.3d 1465, 1488 (D.C. Cir. 1997) (citing with apparent approval the conclusions of the Dunlop Commission that arbitration may be superior to litigation as a method for the resolution of employee claims, especially the claims of lower paid employees).

constructed arbitration may be distinctly preferable to litigation. It may, in fact, be the only practical option. The critical challenge is to create an environment that ensures that the arbitration is both fair and appropriate and conducted by arbitrators who are "competent, conscientious and impartial."³⁹

The most commonly suggested solutions are ones that would regulate various aspects of arbitration, including notice, procedure, cost sharing, arbitrator selection, arbitrator competence, record keeping, and judicial review. These solutions aim, in short, to make arbitration more "lawlike."⁴⁰ This paper recommends a different approach designed to retain as much of the flexibility of the current law as possible consistent with the avoidance of opportunistic behavior and abuse. It builds on the recognition that the extension of mandatory arbitration to such areas as consumer transactions and non-collective bargaining employment has created a situation in which neither any effective bargaining nor adequate non-contractual forms of policing and control are likely. It aims, therefore, to create incentives on the part of parties who want to compel arbitration of disputes arising in these contexts to make that arbitration fair by placing the burden of proof on them. That burden could be met by demonstrating that the arbitration is the product of genuine bargaining over the choice of forum⁴¹ or that, although adhesive, is adequate and objectively fair under the circumstances.⁴²

39. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 634 (1985).

40. *See, e.g., Estreicher, supra* note 23.

41. In *Prudential Insurance Co. of America v. Lai*, 42 F.3d 1299, 1304-5 (9th Cir. 1994), the court, tracking the language of Senator Dole during debate on proposed § 118 of the Civil Rights Act of 1991, required that agreements to arbitrate claims arising out of Title VII be knowing and voluntary. The issue in *Lai* was whether the agreement constituted a knowing waiver. The court held that under the circumstances of the case, *Lai* did not know that the agreement covered Title VII claims. In *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182 (9th Cir. 1998), the court took up the voluntariness prong of the test and concluded that an arbitration agreement required as a condition of employment was not entered into voluntarily. The court acknowledged that, while the word "voluntarily" can be understood to include agreements imposed on an employee as a condition of employment, in the case of Title VII claims, Congress intended that it be given a more restrictive meaning. It is such a restrictive meaning that I am contending for here.

The National Association of Securities Dealers' ("NASD") proposal for changes in the organization's mandatory arbitration requirement relating to statutory discrimination claims appears to be a very useful model. *Id.* at 1186 n.1. It would not, however, prevent individual firms from continuing to require the arbitration of such claims. Deborah Lohse, *NASD Votes to End Arbitration Rule in Cases of Bias*, WALL ST. J., Aug. 8, 1997, at B14.

42. The objectively fair test could be met either by demonstrating compliance with an arbitration procedure approved by the relevant regulatory agency, see, for example, Magnuson-Moss Warranty Act 15 U.S.C. § 2310(2) (1994), or that the procedures were ones that comported with the reasonable expectations of the non-drafting party, comported with the overriding obligation of good faith, and were designed to ensure an adequate forum for the determination of the relevant dispute. *See* RESTATEMENT (SECOND) OF CONTRACTS § 211. A procedure that would have the effect of weakening a claimant's ability to make out a claim would not meet the test unless specific countervailing considerations were present,

I. THE EMERGING FEDERAL LAW OF ARBITRATION: HOW WE GOT TO THE CURRENT SITUATION

In *Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc.*,⁴³ the Supreme Court began radically rewriting the law of arbitration in the United States.⁴⁴ Ignoring sixty years of more or less consistent judicial interpretation of the Federal Arbitration Act of 1925,⁴⁵ the Court announced in *Mitsubishi* that it had discovered in that statute a federal intent of previously unappreciated scope and importance to enforce pre-dispute mandatory arbitration agreements.

The Court held that by entering into a franchise agreement containing an agreement to arbitrate in Japan all disputes relating to that franchise agreement, the franchisee had lost its right to bring its U.S. antitrust claims against the franchisor in court and could be compelled to bring those claims in the Japanese arbitration. Just as the franchisee could have agreed to waive its potential claim against Mitsubishi in return for good and valuable consideration, the Court reasoned, it could enter into an enforceable agreement to arbitrate such a claim should it arise in the future. To permit it to do otherwise, the Court explained, would be to allow it to avoid the consequences of its own bargain.

The Court went to some lengths to explain that there was no reason to believe that the arbitrators would ignore U.S. antitrust law. It acknowledged that "our attachment to the antitrust laws may be stronger than most,"⁴⁶ and that "the international arbitral tribunal owes no prior allegiance to the legal norms of particular states,"⁴⁷ but, in spite of such strong reasons for concern, the Court refused to "assume at the outset" that the forum would be inadequate or that the arbitrators chosen would be other than competent, conscientious, and impartial.⁴⁸

such as an agreement not to raise certain defenses in arbitration or an enforceable commitment to a speedy resolution of the dispute.

43. 473 U.S. 614 (1985).

44. Carrington & Haagen, *supra* note 2, at 331-402. See also Sternlight, *Panacea*, *supra* note 5; Sternlight, *Fresh Assessment*, *supra* note 5.

45. United States Arbitration Act of 1925, Pub. L. No. 25-401, ch. 213, 43 Stat. 883 (codified as amended at 9 U.S.C. §§ 1-307 (1994)).

46. *Mitsubishi Motors*, 473 U.S. at 634 n.18.

47. *Id.* at 636.

48. *Id.* Having held that no reason existed to assume a problem, the Court found some comfort in the fact that one of the three arbitrators had "American legal training" and had written on Japanese antitrust law. *Id.* at 634 n.18. Reviewing the cases decided since *Mitsubishi*, Ronald Offenkrantz has concluded that "courts have confirmed awards involving antitrust disputes where there was a total absence of any indication that the antitrust issues were even considered by the arbitrators." Ronald Offenkrantz, *Arbitrating RICO: Ten Years After McMahon*, 1997 COLUM. BUS. L. REV. 45, 51 n.29. Even in cases where the courts have compelled arbitration explicitly conditioned on the understanding that the arbitrators were required to apply U.S. antitrust law, Offenkrantz concluded that the antitrust issues were either settled, withdrawn or ignored by the arbitrators. *Id.* M. Scott Donahey argues that the judicial review provided for in *Mitsubishi* is too sweeping, and is "not conducive to expanding international trade." "Where it appears that national courts are determined to protect their nationals from the consequences of their freely made agreements, then respect for international agreements are [sic] at risk." M. Scott Donahey,

The Court did not explain what it might take to overcome the assumption of impartiality and competence.

Since *Mitsubishi*, the Court has interpreted the FAA to give parties the authority to use contracts to mandate arbitration of disputes not only in those areas in which arbitration has traditionally been employed, like industry arbitration and collective bargaining, but also in non-traditional areas like consumer transactions and non-union employment.⁴⁹ Despite the urging of commentators that this protection should not be extended to pre-dispute agreements to arbitrate civil rights cases,⁵⁰ the Court held in *Gilmer v. Interstate/Johnson Lane Corp.* that it did.⁵¹ The Court has, in fact, extended the range of matters subject to mandatory arbitration to all statutorily based claims except those in which (1) the statute creating the right makes the right non-arbitrable;⁵² (2) there is an inherent conflict between compulsory arbitration and the statute's purpose;⁵³ or (3) the arbitral forum is not adequate to vindicate the right.⁵⁴

At the same time that it discovered in the FAA broad authority to enforce pre-dispute agreements to arbitrate even as to public law claims, the Court also effectively stripped from the states the ability to regulate the fairness of these agreements. The first such assault was in *Southland Corp. v. Keating*,⁵⁵ a case involving the California Franchise Investment Law.⁵⁶ That statute invalidated arbitration clauses in franchise agreements that attempted to "oust" the California courts of jurisdiction to enforce the disclosure requirements contained with the

From The Bremen to Mitsubishi (And Beyond): International Arbitration Adrift in U.S. Waters, 7 AM. REV. INT'L ARB. 149, 160 (1996).

49. See, e.g., *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989).

50. See Edwards, *supra* note 37.

51. 500 U.S. 20, 35 (1991).

52. As Professor Estreicher has noted, this inquiry is awkward because most potentially relevant statutes were passed before the Supreme Court discovered this new policy in an old statute and reversed sixty years of decisions interpreting it differently. Samuel Estreicher, *Arbitration of Employment Disputes Without Unions*, 66 CHI.-KENT L. REV. 753, 789 (1990).

53. In *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182 (9th Cir. 1998), the Court of Appeals held that an employer's requirement that employees agree to mandatory arbitration of their Title VII claims was not enforceable because it was inconsistent with the underlying purposes and legislative history of Title VII. Two of the three district courts to consider the issue have decided that such agreements to arbitrate Title VII claims were enforceable. *Johnson v. Hubbard Broad., Inc.*, 940 F. Supp. 1447 (D. Minn. 1997); *EEOC v. Frank's Nursery & Crafts, Inc.*, 966 F. Supp. 500 (D. Mich. 1997). The third refused to enforce the agreement because the forum provided for was inadequate, since it failed to give plaintiffs a role in the selection of the arbitrators. *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 995 F. Supp. 190 (D. Mass. 1998). Samuel Estreicher has argued that no persuasive reason exists for treating Title VII differently from other statutory employment claims that have been found to be arbitrable by the Supreme Court. Estreicher, *supra* note 23, at 1361.

54. See *Rosenberg*, 995 F. Supp. at 192.

55. 465 U.S. 1 (1984).

56. CAL. CORP. CODE §§ 31000-31516.

Act.⁵⁷ Although franchisees have traditionally been regarded as parties likely to be taken advantage of by entities with superior bargaining power, and thus in need of protection from the state, the Court held that California could not treat the disclosure requirements as inarbitrable because California law was preempted by the FAA.

In *Allied-Bruce Terminix Cos. v. Dobson*,⁵⁸ the Court faced a similar question in the context of a consumer termite bond. Under Alabama law, pre-dispute arbitration agreements are unenforceable.⁵⁹ Unlike California, the Alabama courts did not attempt to regulate arbitration agreements voluntarily entered into and contained in contracts involving interstate commerce, which they recognized as governed by the FAA. The Supreme Court of Alabama held, however, that in order to bring a contract within the ambit of the FAA, the parties had to contemplate substantial interstate activity when they entered into the contract, and the parties to this termite bond covering a private home in Fairhope, Alabama, did not contemplate such activity.⁶⁰ Over the dissents of Justices Scalia and Thomas, the Court reversed the judgment of the Alabama Supreme Court and held that the FAA was intended to reach to the limits of Congress' Commerce Clause power.⁶¹ The Court rejected the arguments of twenty state attorneys general that such an extension would make it extremely difficult for the states to police predatory behavior, noting that the abuses had not been proven and that parties had written contracts in reliance on *Southland*.

The following year, in *Doctor's Associates, Inc. v. Casarotto*,⁶² another case involving a pre-dispute arbitration clause contained in a franchise agreement, the Court considered whether Montana could, in the interests of protecting its citizens, mandate that such a clause meet certain requirements designed to increase the likelihood that the non-drafting party would actually be aware of its existence. Specifically, the Montana statute required that any such clause appear on the first page of any agreement in which it was contained. The regulation placed only a minimal burden on the party asserting the validity of the clause, but it was one burden too many. The Court held that the FAA entirely preempted state arbitration law. Although a person surprised by a clause buried in an arbitration clause could continue to raise any common law contract defense that he or she might have relating either to the formation or interpretation of the contract, the state could not police the fairness of the agreement through the more efficient means of legislation.

57. See Carrington & Haagen, *supra* note 2, at 380.

58. 513 U.S. 265 (1995).

59. See *Allied-Bruce Terminix Cos. v. Dobson*, 628 So. 2d 354, 355 (Ala. 1993) (citing ALA. CODE, § 8-1-41 (1975)).

60. *Id.* at 359-57.

61. *Dobson*, 513 U.S. at 269.

62. 517 U.S. 681 (1996).

II. MANDATORY ARBITRATION IN CONTEXT: A (VERY) SHORT AND SELECTIVE HISTORY OF ARBITRATION

In giving this expansive and unprecedented reading to the FAA, the Supreme Court cut arbitration loose from many of the institutional and legal constraints that had operated on it. In fact, it did much more than that. It also cut arbitration loose from its historical moorings. In so doing, it subjected to arbitration disputes arising out of relationships that have none of the traditional controls on abuse of the process.⁶³

Parties in the Anglo-American legal tradition have agreed to resort to private arbitration in preference to litigation in the courts for a long time and for many different reasons. It is possible to identify at least four very different strands in this tradition—transformative, small claims, private commercial, and collective bargaining—each of which has very different goals, and each has contained different control mechanisms, none of which are present in many of the situations to which the Court has now extended the FAA.

A. Transformative Arbitration

1. *The Voluntary Model (The Common Peacemakers of Colonial Pennsylvania)*

In founding a new colony on the western bank of the Delaware River, William Penn hoped to create “a truly peaceful” place.⁶⁴ His plans for the physical layout of Philadelphia envisioned broad streets and green open spaces, but, alone among American cities at the time, no fort and no city walls.⁶⁵ It was his intention to treat both the native peoples and the colonists fairly, and his expectation that just dealings would obviate the need for fortifications.

Penn’s plans for the legal system of the new colony aimed similarly to produce peace through justice and reconciliation among contending parties. Although he harbored serious doubts about whether any law or frame of government could make men good, he believed that it was the responsibility of government to create the conditions in which good men could behave well.⁶⁶ As a result, he advocated alternatives to the divisiveness, social discord, and adversarial conflict associated with litigation. In one of the earliest statutes passed in the new colony, the colonial assembly provided for the appointment of three “common

63. As William Park has noted, whether arbitration is useful depends very much on the context. William W. Park, *When and Why Arbitration Matters*, in *THE COMMERCIAL WAY TO JUSTICE*, 73, 80 (1997) (quoting Samuel Johnson: “a cow is a very good animal in the field, but we turn it out of the garden.”).

64. Mary Maples Dunn & Richard S. Dunn, *The Founding 1681–1701*, in *PHILADELPHIA, A 300 YEAR HISTORY* 1, 5 (Russell F. Wigley, ed., 1982).

65. *Id.* at 6.

66. WILLIAM PENN, *THE FRAME OF GOVERNMENT* (1682), reprinted in JOHN BLAIR LINN, *CHARTER TO WILLIAM PENN AND LAWS OF THE PROVINCE OF PENNSYLVANIA, PASSED BETWEEN THE YEARS 1682 AND 1700*, at 92–93 (1879).

peacemakers" in each district in the colony. These peacemakers were supposed to arbitrate between any parties who chose to bring their disputes to them, and their "arbitrations" were given the same force as court judgments.⁶⁷ It was hoped that this institution would further the creation of a Christian community by permitting men who were supposed to stand "in a loving and friendly relationship to each other" to settle their differences finally and effectively, but without resort to the courts.⁶⁸ Such a system could not and would not work to promote those social and religious goals if it were not genuinely voluntary.

The arbitration law was facilitative. It allowed parties to submit their disputes to the common peacemakers rather than the County Court. It did not require them to do so, nor did it permit parties to enter into contracts requiring them to use it. It was limited to situations in which both parties to a present dispute wanted to be in arbitration, and so the statute treated the common peacemaker device as an alternative for those who wanted to avoid conflict. It did not impose arbitration on those who believed that their communitarian responsibilities did not override their desire to vindicate their legal rights.⁶⁹

There are echoes of Penn's vision of a better way to resolve disputes in contemporary ADR literature.⁷⁰ The language has become more secular, but the goals are very much the same. Three hundred years ago, those goals required that resort to the alternative means of dispute resolution be voluntary. They are ill served by processes that compel the distrustful and unwilling to participate, however crowded the courts' dockets.

67. Laws made 10 March 1683 at an Assembly in Philadelphia, ch.LXV. (The text of the statute is reproduced in LINN, *supra* note 66, at 128. The experiment with the common peacemakers lasted one decade. The Crown abrogated the law in 1693. The common peacemaker statute was designed to replicate the ways in which Quakers settled disputes within the meeting. Dunn & Dunn, *supra* note 64, at 30. Colonial South Carolina, Connecticut and New Jersey also each experimented with replacing court litigation with arbitration. See LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 45 (2d ed. 1985).

68. Dunn & Dunn, *supra* note 64, at 29.

69. It is possible that those who chose not to make use of the common peacemakers and instead used the courts to vindicate what they believed were their rights ran the risk that not only would they incur the bad opinion of the neighbors, but also that they might be judged "common barrators" for "vexing others with unjust frequent and endless suits." If a court determined that someone was a common barrator, it could dismiss the claim and impose punishments of fine and imprisonment. Dunn & Dunn treat the barratry statute as if it were closely connected to the common peacemaker statute, but the record is, in fact, unclear. Pennsylvania's first barratry statute, enacted in the same session as the common peacemaker statute, repeated almost verbatim the earlier provision in the Duke of York's Laws of 1676, and barratry was an offense at common law in England. *Id.* at 30. See 4 WILLIAM BLACKSTONE, COMMENTARIES *133-34.

70. See, e.g., Menkel-Meadow, *supra* note 25, at 1874 (discussing the possibility that ADR may provide "more humane ways of dealing with disputes").

2. The Coercive Model (The Radical Republican Vision in the Early Republic)

The radical Republicans in early nineteenth century Pennsylvania were prepared to coerce parties into arbitration, or more accurately they were prepared to destroy the alternatives.⁷¹ Like the Quaker founders of the Commonwealth, the radical Republicans were distrustful of lawyers, judges, and courts, although their reasons were political rather than religious. They believed that justice dispensed through litigation was too expensive, that the procedures involved in common law causes of action were far too complicated to meet the needs of ordinary people, and that the legal culture encouraged abuse and hierarchy. They proposed, therefore, to disband the legal profession, codify the laws, and replace litigation with arbitration before lay judges.⁷² They hoped that by changing the forum and simplifying the modes of proceeding and rules of procedure they could return justice to the people. They hoped that it would be possible for every man to argue his own case without fear of running afoul of the intricacies of the common law. In such an environment, they believed, the poor could be put on a par with the rich before the law, and they would not need to fear losing their property to the deceit and cunning of lawyers and the bias of judges.⁷³

It is possible to find rhetorical echoes of the radical Republican position in late twentieth century industry newsletters. Readers are reminded that the problem facing the industry is lawyers and that arbitration is a way of controlling costs and insuring just outcomes.⁷⁴ The radical Republican reform proposals, however, had profoundly different stated goals. They constituted a self-conscious attempt to change substantive outcomes. The FAA, in contrast, purports to do nothing more than facilitate the utilization of a substantively neutral procedural alternative. The radical Republicans intended to systematically alter results. The Court denies that the FAA has any such goal, despite mounting evidence that this is its effect.

B. Small Claims

During the eighteenth century, Parliament began experimenting with arbitral models as a way of dealing with a problem, the adjudication of claims for small debts, that for jurisdictional and cost reasons could not be handled in the courts of law. It created a series of courts of very limited geographical and subject matter jurisdiction, known as the Courts of Conscience.⁷⁵ These courts constituted,

71. RICHARD E. ELLIS, *THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC* (1971).

72. See S. B. PRESSER & J. S. ZAINALDIN, *LAW AND JURISPRUDENCE IN AMERICAN HISTORY* 614 (2d ed. 1989).

73. The party split into moderate and radical factions, with the former uniting with the Federalists to take control of the government. The split in the Republican party effectively blocked the radicals' plans for sweeping changes in the law.

74. See, e.g., Zuber, *supra* note 29.

75. 3 BLACKSTONE, *supra* note 69, at *81-83. The first of these courts was established, illegally according to Blackstone, for London by the common council during

according to Blackstone, one of the most important legal developments of the century.⁷⁶ The chief virtue of these courts was their extreme informality. The commissioners of the courts were not judges. Rather they were usually local merchants who dispensed a kind of speedy, rough justice according to their sense of the equities of the situation. As one of these commissioners explained it, he decided cases "without the law."⁷⁷

No one pretended that the justice dispensed by these courts was especially good. There is little doubt that, on occasion, these commissioners engaged in abusive behavior. What the English were prepared to do was live with justice that, if admittedly a little slipshod, was good enough under the circumstances. The abuse was thought to be tolerable because the authority of the commissioners was so limited, both geographically and in terms of subject matter, and because the property and personal rights at stake were regarded as so small.⁷⁸ These proceedings were acceptable because so little was at stake, and because there was no realistic alternative for creditors except to give up their rights entirely.

Matters of employment, important public regulatory statutes and civil rights claims cannot be treated so cavalierly. The loss or ineffective vindication of these rights is a very serious matter. The Court has, in fact, recognized that it is

the reign of Henry VIII. Its authority was confirmed by statute in the reigns of James I and George II. 3 Jac. I c.15; 14 Geo. II c.10. On petition from various localities, Parliament created fifteen courts of conscience for the collection of small debts between 1749 and 1765—Southwark (22 Geo. II c.47), Westminster (23 Geo. II c.27), the Tower Hamlets (23 Geo. II c.30), Lincoln (24 Geo. II c.16), Birmingham (25 Geo. II c.34), St. Albans (25 Geo. II c.38), Liverpool (25 Geo. II c.43), Canterbury (25 Geo. II c.45), Brixton (31 Geo. II c.23), Yarmouth (31 Geo. II c.24), the hundreds of Bradford, Melksham and Whorlston in Wiltshire (3 Geo. III c.19), Doncaster (4 Geo. III c.40), Kirkby (4 Geo. III c.41), the hundreds of Blackheath, Bromley and Beckenham, Rokesly, and Little and Lessness in Kent (5 Geo. III c.8), and the hundreds of Chippenham, Calne and Damerham North, and the Liberty of Corsham in Wiltshire (5 Geo. III c.9)—and enlarged the powers of the existing courts baron for Sheffield (29 Geo. II c.37) and High Peake in Derbyshire (33 Geo. II c.31) to permit them to serve an analogous function. By 1830, Parliament had established two hundred fifty courts of conscience, and one of them, Tower Hamlets, handled 30,000 cases in a single year. H. W. ARTHURS, *WITHOUT THE LAW* 26 (1985).

76. This is not to say that he approved of it. Blackstone believed that it would have been preferable to reform the county and hundred courts. 3 BLACKSTONE, *supra* note 69, at *81–83.

77. ARTHURS, *supra* note 75, at 29 (citing the comments of William Hutton, one of the commissioners of the Birmingham Court of Conscience).

78. Modern audiences are not likely to reach the same conclusion. The commissioners had authority to impose prison sentences of up to forty days, depending on the size of the debt owed. It was certainly enough authority to permit the use of these courts for the purpose of harassing the poor, particularly because creditors would treat the money owed to them by a single individual as a series of separate debts. The failure to pay each one of them could result in an additional forty day prison sentence. The fact that such cavalier treatment of freedom of persons owing small debts was thought to be an acceptable accommodation is a reminder that there is all too frequently a tendency for the trampling of the rights of those whose views are not effectively heard.

crucial and has noted that the courts must retain jurisdiction to review arbitrators' decisions.⁷⁹ What it has not done is insure that the review can be effective.

C. Commercial Arbitration

Traditionally, commercial arbitration has been used in one of two contexts: situations in which the parties have relatively little in common, and those in which they have substantial ongoing relationships. In international trade, for example, the parties may be subject to radically different regulatory regimes, may operate in different social and legal systems, and may bring to the transaction very different assumptions about rights and responsibilities. No public authority common to both of them that they regard as a legitimate body for resolving their differences is likely to exist. It clearly makes sense, therefore, for the parties to create by contract the obligation to refer their disputes to a mutually acceptable neutral decisionmaker.⁸⁰ Where the parties have an on-going relationship, and thus substantial interest in and ability to live with less formal procedures, there are equally obvious reasons why arbitration is appropriate. The revolution of the last fifteen years has opened the arbitration process to situations in which the parties have neither the obvious common interest in avoiding litigation, nor the ability to protect their interests in the setting up the arbitration procedures or in policing the fairness of the results.

D. Collective Bargaining Labor Arbitration

The theory of arbitration is probably better developed in the context of collective bargaining than it is in any other area of the law.⁸¹ As the Supreme Court explained in the *Steelworkers Trilogy*, it is, unlike commercial arbitration, to be understood less as a substitute for litigation than as "the substitute for industrial strife."⁸² The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement.⁸³ The entire process of arbitration in the context of a collective bargaining agreement assumes that the parties are in an ongoing relationship. It also assumes a substantial measure of equality of bargaining power between the employer and the employee bargaining unit. Neither of these assumptions can be made in employment cases outside the context of collective bargaining or in consumer cases. In those cases, the dispute is generally about ending a relationship.

79. See, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 634 (1985); *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 538-39 (1995).

80. Park, *supra* note 63, at 81.

81. *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1472-79 (D.C. Cir. 1997), provides a very full and thoughtful discussion of the differences between arbitration in the context of a collective bargaining agreement and in the context of a mandatory arbitration agreement required by an employer as a condition of work.

82. *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960).

83. See *id.* The point is developed elegantly in Theodore J. St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny*, 75 MICH. L. REV. 1137 (1977).

III. THE ADVANTAGES OF ARBITRATION

The proponents of arbitration claim that it has certain advantages over litigation, most notably speed, cost, privacy, certainty, and predictability. Arbitration is not necessarily any of these things. It can be slow, expensive, and cumbersome.⁸⁴ There is nothing magical about private proceedings that automatically makes them more efficient than those made available by the government. Although it seems probable that private parties will in most cases be able to increase efficiency and lower overall costs because of the greater flexibility of arbitration, these advantages are at least to some degree offset by the fact that courts and litigation are heavily subsidized by taxpayers.

While arbitration is associated with less formal proceedings and simpler, less intrusive methods of discovery, the parties could provide for even more formal proceedings. The parties can provide that arbitration would merely add an additional layer of process, with any dissatisfied party having the right to a de novo jury trial on the merits. They could require that the arbitrators issue a formal reasoned opinion along with their judgment and that the judgment would be subject to judicial review.⁸⁵

More critically, the advantages associated with arbitration come at a potentially substantial cost. Where speed is increased and cost lowered, much of the change is the result of proceedings that allow for less discovery. More restrictive discovery may leave a plaintiff with a meritorious claim unable to prove it. The vaunted predictability of arbitration of employment cases may be another way of saying that employees lose. It has been reported that in cases involving the mandatory arbitration of employee claims, seventy percent are decided in favor of the employer.⁸⁶ The informality of proceedings may be another way of describing an undisciplined arbitrator prepared to exercise Solomonian wisdom to compromise a claim.⁸⁷ Arbitrators may be wholly unqualified to handle the matters submitted to them, and their judgments are generally immune from review, causing some sophisticated parties to resist submitting their disputes to arbitration.⁸⁸

IV. THE VARIETIES OF ARBITRAL EXPERIENCE

Any discussion of the arbitration process is inherently difficult because arbitration can take many different forms. Arbitration is what the parties say it is. The parties to an arbitration agreement have very wide latitude in selecting the

84. See, e.g., Robert Miletsky, *Owners, Contractors Find Flaws in AIA Forms and Other A/E Agreements*, DESIGN FIRM MGMT. & ADMIN. RPT., Mar. 1998, at 1 ("Mandatory arbitration rarely provides the quick, cheap, and controllable alternative to litigation that its drafters intend.").

85. For the proposition that parties have broad discretion to structure arbitration procedures, see *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 469 (1989).

86. *Forced into Arbitration? Not Anymore*, *supra* note 22.

87. Park, *supra* note 63, at 82.

88. *Id.*

arbitrators,⁸⁹ setting the terms under which the arbitration will take place, and choosing the place of the arbitration.⁹⁰ They can provide for limited or extensive discovery.⁹¹ They can give the arbitrators broad or narrow remedial powers. They can require the arbitrators to be experts in the relevant law and direct them closely to follow legal precedent, or they can give the arbitrators broad discretion to effect their notions of equity and the authority to decide matters "without the law." They can do all of these things, and they have.⁹²

They may not be able to do these things and still submit their disputes to the principal arbitration bodies like the American Arbitration Association. Such groups may and have refused to accept arbitrations where the parties have attempted to specify arbitration without guarantees of procedural fairness. However, there is no requirement that arbitrations be conducted under the auspices of such groups. Despite the establishment of ethical standards for arbitrators, parties are not obligated to select arbitrators who agree to adhere to such standards.

The Supreme Court confirmed the latitude that parties have in constructing their agreements in *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*.⁹³ Although in the wake of *Doctor's Associates, Inc. v. Casarotto*,⁹⁴ states can no longer regulate contracts to arbitrate that are covered by the FAA, except on such grounds as would apply to all contracts, the parties can agree to be bound by the arbitration law of a state.⁹⁵ This contractual freedom has resulted in many varieties of arbitral experience. At one end of the spectrum, arbitration may be in effect private litigation. It may operate according to the rules of civil procedure and may employ as arbitrators individuals who in all respects resemble, and may recently have been, judges. In fact, arbitration does not even need to be private. Arbitrators can be appointed by the state and required to operate according to state law.⁹⁶ At the other end of the spectrum of possibilities, arbitration can be an adjudicatory process that is about as

89. A recent survey of employee arbitration agreements covering thirty-six companies found that fifteen percent of them gave employers the sole right to select arbitrators. Underwood & Kaufman, *supra* note 22, at 48.

90. Sternlight, *Fresh Assessment*, *supra* note 5, at 6.

91. A recent survey of employee arbitration agreements covering thirty-six companies found that one-third did not provide for discovery at all. Underwood & Kaufman, *supra* note 22, at 48.

92. Park, *supra* note 63, at 80-82.

93. 489 U.S. 468 (1989).

94. 517 U.S. 681 (1996).

95. See Richard Speidel, *Securities Arbitration: A Decade After MacMahon, Contract Theory and Securities Arbitration: Whither Consent?*, 62 BROOK. L. REV. 1335, 1342 (1996).

96. For an early example of state supported arbitration, see Laws made 10 March 1683 at an Assembly in Philadelphia, ch.LXV, which provide for the appointment of three common peacemakers in each district of the Colony of Pennsylvania. Linn, *supra* note 66, at 128.

different from litigation in a court as possible. In the middle, it may resemble a reasonable compromise.⁹⁷

A. Apples and Oranges

The Dunlop Commission's Fact Finding Report noted that arbitration may have distinct advantages over litigation for employees. Those who attempt to vindicate their rights through litigation face long delays and high costs. These costs are particularly burdensome on low wage workers who may not have time or resources to pursue a court case through to judgment. In addition, the sharply adversarial nature of litigation may be particularly inappropriate for employees who have legitimate grievances but want to stay on the job. For such employees, arbitration may be the only viable alternative.⁹⁸

Proponents of mandatory arbitration, and even those who are more accurately characterized as thoughtful commentators on the world of dispute resolution,⁹⁹ have complained that there is a tendency to grieve for the loss of litigation that has distorted the debate about mandatory arbitration. Critics of ADR, they insist, tend to compare idealized litigation to arbitration with all of its real world imperfections. It is a case, Professor Estreicher observes, of not just comparing apples and oranges, but apples and spoiled oranges. Unfortunately one reason for these invidious comparisons has nothing to do with unfair and opportunistic debating tactics. At the risk of drawing the metaphor out beyond the patience of any reader, spoiled fruit is out there, as are vendors who insist on making customers buy it and courts that are endorsing the practice.

Take as an example the recent case of *Bercovitch v. Baldwin School, Inc.*¹⁰⁰ Jason Bercovitch was a student at the Baldwin School, a private English

97. The Dunlop Commission report embraces a model of arbitration for employment arbitration that contains substantial protections for the rights of parties to the proceeding. See U.S. DEP'TS OF COMMERCE AND LABOR, COMM. ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, REPORT AND RECOMMENDATIONS 31 (Dec. 1994). Working from its recommendations, Professor Estreicher recommends that there should be a number of "essential safeguards" to insure fairness of arbitrations of at least those employment disputes that relate to public law claims. These safeguards include standards of competency for arbitrators, a reasonable place for the holding of the arbitration, fair methods for obtaining information from the other side, a fair method for sharing costs, a right to counsel, a range of remedies equal to those available through litigation, a written award, and judicial review. Estreicher, *supra* note 23, at 1349-50. The mere listing of the protections that ought to be afforded to parties is a reminder of all that can be, and regularly are, left out.

98. U.S. DEP'TS OF COMMERCE AND LABOR, *supra* note 97 at 31.

99. See, e.g., Stempel, *supra* note 11, at 356-57 (Stempel argues that a major failing of critics of ADR has been the consistent failure to accurately portray the failings and shortcomings of court litigation, thus distorting the discussion of the relative merits of litigation and ADR. "When faced with a bad or biased judge, or a hostile jury, I will place my faith in the AAA panel any day." *Id.* at 357).

100. 133 F.3d 141 (1st Cir. 1998). This account is based on the two reported opinions. It is not intended to be a reflection on the good faith of any of the parties involved

language school in Bayamon, Puerto Rico.¹⁰¹ Jason apparently is a bright child, fully able to do the academic work required in his classes,¹⁰² but had difficulty controlling his behavior and was disruptive.¹⁰³ As a result of his disruptive behavior, the school's administration decided to suspend him indefinitely from the school. In the wake of the suspension, Jason's parents had him undergo an extensive psychological examination. The psychologist conducting the examination diagnosed Jason as having Attention Deficit-Hyperactivity Disorder, Opposition Defiance Disorder, and childhood depression. She referred him to a psychiatrist who recommended a course of behavior modification, therapy and medication. He also recommended that Jason return to the Baldwin School as soon as possible.

Jason's parents requested that the school readmit him and make accommodations to his disabilities that they believed would make it possible for him to function productively at the school. The Baldwin School, believing that it could not accommodate Jason without unduly disrupting the school, refused their request. Jason's parents then brought suit in federal court alleging that the refusal constituted discrimination in violation of the Americans with Disabilities Act. The District Court issued a preliminary injunction ordering that Baldwin School readmit Jason and prescribing that the school make certain accommodations. The school appealed and moved to compel arbitration. The Court of Appeals granted the motion.

The Bercovitchs had signed a re-enrollment form for Jason, then a fifth grader, in 1996. This form appears to have had a variety of functions, including a planning one. It allowed the school to know how many of the current students expected to return and thus how many spaces would be available for new students. The school required the legal guardians of all returning students to sign and submit the form, the terms of which were not open to negotiation. Clause 5 of that form obligated the parents on behalf of their child to abide by the bylaws of the school. They were not provided with a copy of those bylaws but were informed that copies were available for review in the school's main office. Clause 11 of the form provided that "any and all disputes arising under this contract must be resolved by arbitration" pursuant to the school's by-laws. Article XI of the bylaws defined the nature and scope of that 'arbitration.'"¹⁰⁴

Any and all disputes arising out of these By-Laws or their application or the application of any rule, regulation, policy, resolution or act or contract implemented or carried out pursuant to these By-Laws shall be resolved, in the first instance, by the person charged with responsibility for the application or implementation of such. Any interested party affected adversely by the initial

or on their actual conduct in arbitration, matters about which I know nothing. It is rather about the facial fairness of the proceedings imposed in the arbitration agreement.

101. *Id.*

102. *Bercovitch v. Baldwin Sch.*, 964 F. Supp. 597, 599 (D.P.R. 1997).

103. *Id.*

104. *Bercovitch* 133 F.3d at 147 (quoting the arbitration agreement). The Court of Appeals noted that the Bercovitchs did not claim to be unaware of the arbitration provision in the agreement. *Id.*

resolution of the controversy dissatisfied with the initial determination must submit their position in writing to the board of directors, which, by itself or through such person or persons designated for such purposes and, after due process, will resolve the dispute and such determination will be final and binding.¹⁰⁵

The board of directors of the school reserved to itself the right to decide the number and identity of the arbitrators. The arbitrators could be the entire board, or some number of the board appointed for the purpose, or one or more individuals not on the board. The only provisions relating to the nature of the proceedings in the arbitration were that the initial challenge had to be in writing and that the proceedings would provide for due process. What constituted the process due was not spelled out in the bylaws. Apparently that was a matter left to the discretion of the arbitrator. The bylaws were much more explicit on the right of appeal from the arbitrator's or arbitrators' decision. There was none.

It was hardly a procedure designed to encourage confidence on the part of an aggrieved individual. It was especially unlikely to inspire confidence in a party seeking assert a federal right that could impose a substantial burden on the school. Nothing in the rules guaranteed anything about the arbitration. They provided no right to call witnesses or even to appear. They provided no right to an explanation, written or otherwise, of any resolution. They did not provide for the Bercovitchs to participate in or object to the selection of any arbitrator. They did not provide that the arbitrator chosen would have any familiarity with the Americans with Disabilities Act.

The Bercovitchs could, of course, appeal the arbitrator's or arbitrators' decision, but in the absence of a record what that appeal would be based on is far from clear. Even if it were possible to make out a ground for appeal, "judicial review of an arbitration award is among the narrowest known to the law."¹⁰⁶ As a practical matter, the determination that an agreement to arbitrate a claim is enforceable is likely to be the final effective judicial review of the matter.¹⁰⁷

Some may not have much sympathy for persons who decide that they want to take their chances with private education and believe they get what they deserve when things do not work out. Some may not have much sympathy for those who expect small schools to make large accommodations to children with learning disabilities and are glad to give the schools the ability to get out from under the

105. *Id.* at 147 n.8.

106. *Coastal Oil of New England, Inc. v. Teamsters Local Union No. 25*, 134 F.3d 466, 469 (1st Cir. 1998) (quoting *Maine Cent. R.R. Co. v. Brotherhood of Maintenance of Way Employees*, 873 F.2d 425, 428 (1st Cir. 1989)). *See also* *United Paperworkers Int'l Union v. Misco*, 484 U.S. 29, 38 (1987) (Courts "do not sit to hear claims of factual or legal error by an arbitrator, as an appellate court does in reviewing decisions of lower courts."); *Service Employees Int'l Union v. Local 1199*, 70 F.3d 647, 651 (1st Cir. 1995) ("Federal court review of arbitral decisions is extremely narrow and extraordinarily deferential.").

107. *See Misco*, 484 U.S. at 36 (Even if the court would have decided an issue differently, an arbitrator should not be overruled "as long as the arbitrator is even arguably...acting within the scope of his authority.").

threat of litigating about matters that are so difficult to assess and understand. Regardless of sympathies, it is difficult to conclude that this is likely to be an effective forum for vindicating Jason's statutory rights.

B. Effective Vindication of Statutory Rights

If the choices of the parties are broad, they are not unlimited. The Supreme Court held in *Mitsubishi* that the arbitral forum must be adequate to permit the party making the claim effectively to vindicate their rights.¹⁰⁸ This standard does not require that the arbitral forum provide the same procedural rights as a court, that it insure the same levels of competence, or that it provide the same range of remedies. It requires only that they be capable of being vindicated.

As interpreted by the courts, this requirement is, as Jason Bercovitch discovered, hardly robust. But it is not entirely empty either. In *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, for example, a federal district court refused to compel arbitration of an age and gender discrimination case on the ground that the arbitration procedure did not provide for adequate arbitrator independence.¹⁰⁹ In *Cole v. Burns International Security Services*, the Court of Appeals for the District of Columbia agreed to compel arbitration only after interpreting the agreement to require an employer who made arbitration a condition of employment to pay the costs of the arbitration.¹¹⁰

In general, however, the courts have shown a great deal of reluctance to second guess arbitral arrangements. In *Rosenberg*, attorneys for the plaintiff attempted to show bias on the part of the New York Stock Exchange ("NYSE") arbitration panels by showing first that the panels overwhelmingly were made up of older, white men, and that women who bring claims in court prevail more often and win larger awards than women who are forced to arbitrate. The court rejected both arguments. As the judge noted, in the absence of evidence of the relative merits of the claims brought in different fora, it would be impossible to conclude that the differences in outcome were due to bias alone. But if that is the burden, it is one that is effectively impossible to meet. Even assuming that there was a case in which the potential damage award justified counsel in conducting such an extraordinarily burdensome investigation, and even assuming that it would be possible to get a court to accept the methodology used to make the comparisons, most arbitral bodies do not keep the kind of records that would make it possible to convincingly prove a case.¹¹¹

108. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 636 (1985).

109. 995 F. Supp. 190 (D. Mass. 1998).

110. 105 F.3d 1465 (D.C. Cir. 1997). *See also* James B. Geren, *Recent Development: Cole v. Burns International Security Services*, 13 OHIO ST. J. ON DISP. RESOL. 263 (1997).

111. *See* discussion of arbitration in the securities industry in *Rosenberg*, 995 F. Supp. at 198.

C. The Problem of Asymmetric Information

In his recent article in the *New York University Law Review*, Professor Estreicher goes through a multiple step argument in an attempt to establish that pre-dispute mandatory arbitration contracts ought to be enforced as to statutory employment claims.¹¹² He begins with a proposition that "most would agree with," that post-dispute agreements to arbitrate existing disputes do not raise especially difficult problems. He then argues that because such agreements do not raise difficult problems, and because parties are able to enter into enforceable contracts to waive potential claims, including those arising under federal discrimination laws, in return for monetary or other valuable consideration, no serious objection should exist for the parties to negotiate a post-dispute adjudicative process. He next asserts that pre-dispute agreements to arbitrate individual employment contracts "seem relatively noncontroversial." Finally, he concludes that with appropriate procedural safeguards, arbitration of employment disputes ought to be encouraged as "an alternative, supplementary mechanism" in addition to litigation.¹¹³ I concur with the final conclusion, but not the intermediate steps.¹¹⁴

Most would agree¹¹⁵ that while people may have strong views about the relative merits of various dispute resolution procedures after they have gone through them, people are likely not to have very good understanding of what these procedures may entail before they have experienced them. A decision to agree to one type of forum or another is likely to be one that is not "knowing" in the sense that it is likely to be poorly understood. Because it is likely to be poorly understood, there is a good public policy reason to supervise contracts to substitute private dispute mechanisms for public ones. This proposition does not require a rosy view of the courts or rest on an assessment of the relative merits of litigation

112. Estreicher, *supra* note 23, at 1346-48.

113. *Id.*

114. Given that I agree with the final conclusion, and given that I agree that the courts are among those who agree with Professor Estreicher, it may seem churlish to quibble about the intermediate steps. I do so because the speed and ease with which the courts slide over the intermediate difficulties has an affect on their treatment of the final conclusion. If post-dispute contracts to arbitrate are understood to raise no problems, the tendency is to minimize those surrounding pre-dispute agreements. The claim that agreements to arbitrate purely contractual matters is uncontroversial lowers the sensitivity of the courts to the admittedly much larger problems associated with the resolution of statutory claims.

115. This should be understood as a rhetorical statement, rather than an empirical one, although I did attempt a limited and admittedly not very scientific study with my contracts class and with a group of three middle school teachers. The students and teachers were given a form used in connection with the provision of healthcare. The form required that they consent to the receipt of care and assume financial responsibility for that care. It also asked them to agree to submit any claims arising out of their care to arbitration in the event of a dispute. I then asked a series of questions about the form and the obligations that had been taken on. There was a dramatically fuller understanding of the meaning of the clauses relating to care and financial responsibility than there was of the obligations imposed by the arbitration clauses. Most of the participants had only a very vague sense of what the arbitration and the arbitral forum might be.

and arbitration. Rather it is based on the assumption that choices between arbitration and litigation are likely systematically to be made by at least one of the parties on the basis of no information, inadequate information or misinformation, and that one party to the transaction is likely to know that. Such information failures are likely to lead to inefficient market results.¹¹⁶ This is a strong reason, therefore, to require the lowest cost avoider, presumably the party seeking to impose a mandatory arbitration agreement, to provide reliable information to the party being asked to give up the right to go to court.

Once a claim has arisen, parties are likely to be much more careful about their choice of fora and about the procedures used in those fora. They are particularly likely to be careful if the claims are large. At that point, it might become reasonable for an individual to make the substantial investment in time and resources to understand the differences between arbitration and litigation, or the advantages and disadvantages of a particular proposed arbitration, and the case for imposing the burden on the other party is less compelling.¹¹⁷

Even in the case of an actual dispute, the decision about choice of dispute resolution fora will be made at one remove from the level at which people normally focus. It is likely that the party who proposes arbitration will have substantially greater experience with it than the other party. It would, therefore, be perfectly rational to regulate arbitration agreements. It would be rational even for those jurisdictions that did not suffer from any irrational prejudices against arbitration, but merely wanted to insure that parties entered into these clauses knowingly. Most jurisdictions did have such regulations until the Supreme Court interpreted the Federal Arbitration Act as preempting state regulation of arbitration agreements subject to the FAA, except on the same grounds as are "applicable to contracts generally."¹¹⁸

116. Obviously, this is not true in all situations. Transactions between sophisticated parties regularly contain clauses that require them to arbitrate any dispute arising out of the agreement. There is little reason to question these arrangements, and I do not do so here.

117. In *Cole v. Burns International Security Services*, 105 F.3d 1465 (D.C. Cir. 1997), a security guard was presented with a mandatory arbitration agreement by the company that took over the contract to provide security services in the building where he worked. He was told that his employment was contingent on signing the agreement. The notification was exemplary. It explained that he was being required to give up the rights to a trial and to trial by jury and that those rights had value. It also explained explicitly that the agreement covered claims of race discrimination arising out of his employment. He was put on notice that he might want to consult with a lawyer. *Id.* at 1469. It seems extremely unlikely that many, if any, non-unionized security guards would incur the expense of consulting with a lawyer in deciding whether to sign an agreement that would have practical significance only if a dispute arose at some point in the future, when the only alternative to signing was looking for work elsewhere.

118. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (holding that a Montana law requiring arbitration clauses to be on the first page of the agreement to be preempted by the FAA). In a letter to Francis J. Pavetti and Timothy J. Heinsz, dated February 12, 1998 (on file with author), concerning the National Conference of Commissioners on Uniform State Laws draft revision of the Uniform Arbitration Act, M.

V. THE NORMATIVE POWER OF THE LANGUAGE OF CONTRACT

Almost twenty five years ago in *The Death of Contract*, Grant Gilmore confirmed the rumor that contract was dead.¹¹⁹ The twentieth century mind, he argued, had come to understand that "a system in which everybody is invited to do [their] own thing, at whatever cost to his neighbor, must work ultimately to the benefit of the rich and powerful, who are in a position to look after themselves."¹²⁰ This understanding was in sharp contrast, he believed, to a nineteenth century view that gave narrow scope to social duties and celebrated that the race went to the swift.¹²¹ "For good or ill," he concluded:

we have changed all that. We are now all cogs in a machine, each dependent on the other. The decline and fall of the general theory of contract and, in most quarters, of laissez-faire economics may be taken as remote reflections of the transition from nineteenth century individualism to the welfare state and beyond.¹²²

In the years since the publication of that book, it has become clear that either the original reports were greatly exaggerated¹²³ or that contract, like a phoenix, has the ability to rise from its own ashes. Contract may have very limited normative force in a society that has a healthy appreciation of the mutual dependency of individuals, but it has become the normative vehicle of choice through which a society that is no longer able to define the good permits individuals and entities to pursue their own values and ends.¹²⁴ As good a legal

Michael Cramer urges the adoption of a provision in the UAA that, in the case of contracts of adhesion, would require the arbitrator to apply applicable law and would subject the arbitrator's decision to judicial review under the clearly erroneous standard. He argues that such a provision would not run afoul of *Casaroto* because the provision would apply to contracts generally.

119. GRANT GILMORE, *THE DEATH OF CONTRACT* 3 (1974) ("We are told that Contract, like God is dead. And so it is. Indeed the point is hardly worth arguing anymore.").

120. *Id.* at 95.

121. *Id.* at 95-96.

122. *Id.* at 95.

123. See Mark Matassa, *Mark Twain To Speak Via Computer*, SEATTLE TIMES, Nov. 8, 1995, at B3 (quoting Mark Twain's telegram from London to the *New York Journal*, on June 2, 1897, questioning the accuracy of his obituary).

124. On the decline in society's willingness to use the state to pursue the good, see MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT, AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 278-79 (1996).

It is possible to see the normative force of contract in the attempt by various actors to use the language of contract in areas having nothing to do with bargain. At my younger son's school, it has become common for teachers to make children sign contracts that they will do their homework. They, of course, have no choice about whether or not to do it. This is not a subject for negotiation. Rather, calling the rule that homework must be done "a contract" and forcing the children to sign it permits the teachers to add an additional layer of guilt relating to failure to keep one's word to the failure to abide by externally imposed standards, and to tap into the vogue of self-actualization through choice—even when there is none.

scholar as he was, Gilmore was a poor prognosticator. Our social understandings as we approach the end of the millennium look very different from the ones that he described. Recognition that we are cogs in a machine and dependent on one another now appears increasingly uncommon in a world of gated communities and withdrawal from public life.

Contract is coming to assume a position of prominence in the late twentieth century¹²⁵ that would make the proponents of nineteenth century liberty of contract proud.¹²⁶ The nature of the arguments undergirding freedom of contract has, however, changed. In the nineteenth century, the arguments went to the limits on the authority of the state to use the police power to ameliorate the condition of workers.¹²⁷ The late twentieth century arguments accept the authority of the state to regulate but seek to expand the permissible scope of the use of contract by private parties to opt out of the obligations imposed by concededly legitimate common law, statutory and constitutional rules, provisions, and even comprehensive regulatory regimes. In form, these arguments seek to promote contract as a permissive device to enable parties to contract around general obligations imposed by the law.¹²⁸ At the extreme, these arguments treat all legal obligations as mere default rules, subject to being modified or avoided by agreement among the parties. The idea of "contracting around" has gained increasing acceptance among academic lawyers, but nowhere has it had the practical impact that it has had on access to the courts.

This willingness to allow parties to contract around statutes reflects in part a healthy understanding that one size seldom fits all entirely satisfactorily and that

125. See THE FALL AND RISE OF FREEDOM OF CONTRACT (F. H. Buckley ed., forthcoming 1999).

126. See, e.g., *Godcharles & Co. v. Wigeman*, 6 A. 354 (Pa. 1886) (striking down a Pennsylvania statute requiring laborers to be paid at regular intervals and in cash as "degrading to the manhood of laborers."); *In re Jacobs*, 98 N.Y. 98 (1885) (striking down a New York statute regulating where cigars could be manufactured as an impermissible infringement on the right of workers to enter into contracts with their employers); *Johnson v. Goodyear Mining Co.*, 127 Cal. 4, 11-12 (1899) (declaring invalid a California law similar to the Pennsylvania statute struck down in *Godcharles* because it deprived "the working man of intelligence" the right to "make a contract as to the time when his wages will become due"). These cases are cited in LAWRENCE W. FRIEDMAN, A HISTORY OF AMERICAN LAW 559-60 (2d ed., 1985).

127. Gregory Alexander argues persuasively that freedom of contract was a more limited idea in the late nineteenth century than is commonly portrayed, but there is no question that it was aggressively employed against legislative attempts to ameliorate the condition of those workers, who were not thought to be the traditional objects of paternalism. See Gregory S. Alexander, *The Limits of Freedom of Contract in the Age of Laissez-Faire Constitutionalism*, in THE FALL AND RISE OF FREEDOM OF CONTRACT, *supra* note 125.

128. An exceptionally interesting collection of writings on contracting around is contained in the forthcoming THE FALL AND RISE OF FREEDOM OF CONTRACT, *supra* note 125, including: Paul H. Rubin, *Courts and the Tort-Contract Boundary in Product Liability*; Robert C. Ellickson, *The (Limited) Ability of Urban Neighbors To Contract for the Provision of Local Public Goods*; Elizabeth Scott & Robert Scott, *A Contract Theory of Marriage*; Alan Schwartz, *Contracting for Bankruptcy Systems*.

parties will frequently be able to achieve all of the goals of the statutory scheme at substantially lower costs. It also reflects a widely held ideological commitment to permitting individuals and entities to pursue their own values and ends.¹²⁹ It reflects a commitment to the normative power of the idea that individuals ought to be allowed to decide for themselves what is in their own best interests and, as Ronald Reagan argued, to bear the consequences when they are wrong.¹³⁰

If the ground rules for these agreements altering the general statutory arrangements are well thought through and the problems of formation are properly supervised, this extension of the realm of contract is a positive social development. Whenever personal freedom can be extended and the special circumstances of individuals and organizations accommodated without undermining the purposes of the relevant statutes, it should be done.

Serious problems arise, however, when choice is merely equated to the market¹³¹ and when there is, in fact, no opportunity for individuals to decide for themselves because there are no meaningful choices open to them. It is the problem that Richard Speidel has called the "dark side of consent."¹³²

A. Industries of Adhesion and the New Feudalism

Sir Henry Maine argued more than one hundred thirty years ago that one characteristic of modern society is the movement from status to contract.¹³³ Maine believed that contract permitted individuals to order their lives in ways that transcended the traditional patterns based on kinship.¹³⁴ What Maine did not anticipate was that in our post-modern world, or at least post-*Gilmer* world, contract could become the basis of a new feudal order. Contract could be used to create status, or at least reinforce the lack thereof.

In large parts of pre-modern England, the king's writ did not run.¹³⁵ In those places, a person complaining of a wrong done to him had to resort to the manorial court of whatever lord had the feudal right to do justice in that area. The securities industry, in its requirement that all of its registered dealers submit their employment disputes to industry arbitration, is doing a pretty fair imitation of such a feudal lord.¹³⁶

129. SANDEL, *supra* note 124, at 278-79.

130. *Id.* at 309 (quoting Reagan as saying, "We believe that liberty can be measured by how much freedom Americans have to make their own decisions—even their own mistakes.").

131. *Id.*

132. Speidel, *supra* note 95, at 1356.

133. SIR HENRY SUMNER MAINE, *ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS* (1906).

134. *Id.*

135. See PAUL H. HAAGEN, *IMPRISONMENT FOR DEBT IN ENGLAND AND WALES* 271-74 (1986).

136. It is less obvious than is commonly assumed that the Securities and Exchange Commission ("SEC") has the authority to clothe the Exchanges with immunity from antitrust actions when the Exchanges interpret their regulatory authority to extend to

Every person who wishes to work as a broker-dealer for any employer in the securities industry must fill out and sign a standardized registration form. The form includes a clause mandating that the employee submit to arbitration claims that the relevant exchange requires to be arbitrated. The requirements of the form are imposed by an entire industry on each individual dealer. It is presented to the prospective employee on a take it or leave it basis and is not subject to negotiation. There are no dickered terms. If it were a contract, it would be in the nature of a classic contract of adhesion.¹³⁷ Potential employees faced with the decision about whether or not to sign the registration statement are presented with a classic Hobson's choice.¹³⁸ They can agree to sign the registration statement, or they can look for some other line of work. The employee is not in a weak bargaining

the right to require registered dealers and member organizations to agree to the mandatory arbitration of employment disputes. The relevant registration form, the U-4, was created as part of a regulatory process pursuant to section 19 of the Securities Exchange Act of 1934, 15 U.S.C. § 78(s) (1994). That statute authorizes the SEC to delegate certain responsibilities to Self-Regulating Organizations ("SRO"), subject to oversight by the SEC. The powers of the SROs are, therefore, derivative from the Securities Exchange Act. Absent such statutory authority, an attempt by the SROs to regulate its members through a device like the U-4 registration statement would raise serious antitrust questions.

The purpose of the Securities Exchange Act is stated clearly in section 2. 15 U.S.C. § 78(b). It is to compel disclosure of information needed by investors to make prudent investments and to protect themselves from fraud. Self-regulation by organizations such as the NYSE and the National Association of Securities Dealers (NASD) was approved by Congress in 1975 on the advice of the SEC and with the assurance that SROs would share the aim of protecting investors by providing them with information. A broker or firm that engages in fraud injures not only the defrauded investors, but public trust in the market as well. It is, therefore, reasonable to suppose that the industry will strive to correct and punish that form of misconduct that it is the purpose of the SEC to correct and punish.

The SEC has, on the other hand, no jurisdiction to regulate employment relations within the securities industry. If the SEC were, for example, to promulgate a rule requiring firms trading on regulated exchanges to diversify their sales staffs, that rule would be ultra vires and void. *Cf. Business Roundtable v. SEC*, 905 F.2d 406 (D.C. Cir. 1990) (holding invalid an SEC rule purporting to regulate corporate governance practices). Similarly, the SEC cannot require trading firms, as a condition of their access to the market, to impose agreements on their employees to arbitrate labor disputes with their employers, nor can SROs whose power is derivative from that of the SEC. The SRO Codes should, therefore, appropriately be read as extending the jurisdiction of the industry forum only to those disputes having a connection with the purposes of federal securities regulation.

Steven Wallman, Commissioner of the SEC, has raised this same issue. "The imposition by a self-regulatory industry association of rules fixing terms among horizontal competitors regarding matters unrelated to necessary industry competence and qualifications...is inappropriate and should not be continued." *Lawyers May Take U-4 Provisions to Justice Department*, 39 WALL ST. LETTER, July 21, 1997, at 7.

137. See Todd D. Rakoff, *Contracts of Adhesion: An Essay of Reconstruction*, 96 HARV. L. REV. 1173 (1983).

138. Thomas Hobson was a seventeenth century English liveryman who required his customers to take the horse nearest to the door or go without. A Hobson's choice is thus no choice. See WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 395 (1967).

position; the employee is in no position to bargain at all.¹³⁹ “[H]e has no alternative, but [to sign] or to abandon his business.”¹⁴⁰

Although the pre-dispute arbitration clause is in many respects a classic contract of adhesion provision, it is, even by the standards of imposed forms, extraordinarily broad.¹⁴¹ It is a pre-dispute obligation to submit to arbitration those matters that are currently arbitrable or may be deemed arbitrable in the future, and what is deemed arbitrable can change without the consent of the employee.¹⁴² Despite the Court’s treatment of a registered dealer’s bowing to the imposed term as if it were a contract, it looks more like an oath of fealty. The employee is not bargaining over terms. The employee is submitting to a regime.

It is of course true that individuals may waive or surrender their right to jury trial in civil cases. They may have reasons for wanting to do so. It is not so clear that an industry, operating through an SRO, ought to be permitted to bind employees to accept the jurisdiction of its arbitral panels. It is not so clear that an entire industry should be allowed through the device of a “contract” to displace a huge sweep of law, including common and statutory law, and substantive and procedural rights. It is not so clear that the industry should be permitted to declare that no securities dealer in the United States will be permitted to enjoy the protections of the Seventh Amendment as to any matter touching their employment, except at the sufferance of the SRO. It is not so clear that, even in a post-modern world, it is wise or helpful to analyze registration forms as if they were contracts.

That is, of course, precisely what the Supreme Court did in its remarkably inadequate discussion in *Gilmer* of the problems posed by such industry-wide mandatory arbitration. The successful motion to compel Robert Gilmer to arbitrate his age discrimination claim against Interstate/Johnson Lane was based on the Uniform Application for Securities Industry Registration or Transfer that he signed when he went to work for Interstate/Johnson Lane Corporation in 1981. In that application, Gilmer agreed to arbitrate any controversy “that is required to be arbitrated under the rules, constitutions and by-laws of the organizations with which [he registered].”¹⁴³ Gilmer registered with the NYSE. NYSE Rule 347 provided for arbitration of “any controversy between a registered representative

139. On the relevance for the purposes of unconscionability analysis of the fact that this is an industry wide contract, see *Henningesen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960). Here, not only is the provision industry wide, it is one that results not from mere economic power, but from the delegated exercise of governmental authority.

140. *Liverpool & G. S. Steam Co. v. Phenix Ins. Co.*, 129 U.S. 397, 441 (1889).

141. The Rules of the NYSE could be read to require as a condition of employment that the dealer surrender access to the courts and the right to a jury trial in an enormous spectrum of possible disputes, not excluding those arising out of a physical assault by a supervisor or an automobile accident involving a car driven by a patron of the employer.

142. If the recent proposals of the NASD are approved by the SEC, the change in this respect will be substantially for the better. See *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1186 n.1 (1998).

143. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991).

and any member or member organization arising out of the employment or termination of employment of such registered representative."¹⁴⁴ Gilmer could not negotiate around the arbitration requirement. It was one imposed on all persons who worked in the industry.

The Court began by noting the unremarkable—and in the context, wholly irrelevant—proposition that mere inequality of bargaining power between employers and employees would not be a sufficient reason to hold that arbitration agreements are never enforceable in the employment context. It explained that well-supported claims of overwhelming economic power might be sufficient. It then rejected Gilmer's claim because he was "an experienced businessman."¹⁴⁵ Given that no one of any level of experience was in a position to negotiate around the requirement, it is not clear what this holding means, nor is clear how it would be possible to have more "overwhelming" power than where an entire industry marshals an SRO to insure that there will be no dissenters.

Perhaps some obscure reason explains why the securities industry ought to be permitted to force its dealers to resolve their employment disputes in arbitration. The reason cannot in any non-Kafkaesque world be, however, that the employees agreed. The only plausible one can be that it is efficient and fair. Given that it is the industry that wants the alternative forum, it seems appropriate that it should carry the burden of demonstrating its fairness.

B. American Workers Should Not Be Forced to Choose Between Their Jobs and Civil Rights

When Burns International Security Services took over the contract to provide security at Union Station in Washington, D.C., it contacted the employees of the firm that had previously had the contract and offered them employment on the condition that they agree to arbitrate any claims relating to their employment that might arise, including explicitly claims of race discrimination. Clinton Cole, who was working as a security guard at Union Station, objected. He was told that he was free not to sign the agreement, but until he did, he would not be employed.¹⁴⁶ Cole faced an adhesion contract, but not one imposed by an entire industry. He was free to seek work with any other security firm willing to hire him on terms that allowed him to bring a claim in court that might arise out of his employment. Whether there are any such firms in the Washington area is a matter of speculation. It is interesting to contemplate for a moment the likely reaction of potential employers, even those who did not require mandatory arbitration, to questions about the right to sue the employer in court should the applicant be offered a job.

His act of signing the arbitration clause is treated, nonetheless, as an agreement. In fact, the dissent angrily objected to the majority's characterization of the case as one in which arbitration was compelled because it had been mandated

144. *Id.*

145. *Id.* at 33.

146. *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1469 (D.C. Cir. 1997).

by the employer. The dissent insisted that it was compelled "because each party agreed that the [majority] could so elect."¹⁴⁷ The dissent went on to insist that the only grounds for treating the agreement as anything other than a valid, enforceable contract would be traditional contract doctrines like duress or unconscionability.¹⁴⁸

That position is clearly correct if the initial demand to waive right of access to the courts was appropriate, if individual firms have the right to secede from the general body politic. However, the initial demand is more problematic than the dissent in *Cole* treats it. Congress made clear in passing the Civil Rights Act of 1991 that "American workers should not be forced to choose between their jobs and their civil rights."¹⁴⁹ That does not mean that compulsory pre-dispute arbitration agreements cannot be used. It ought to mean that if such agreements are employed, they have to be fair and should not weaken enforcement of the underlying rights. If the effect of arbitration is to lessen those civil rights protections, then those workers are being forced to choose between those rights and their jobs. If they are forced to carry the burden of proving that the arbitral forum imposed on them as a condition of employment will not vindicate their rights, then they will not only be unable to choose, they will lose as well.

C. Traditional Contract Defenses

The Court has explained repeatedly that "[w]hen deciding whether the parties agreed to arbitrate a certain matter...courts...should apply ordinary state-law contract principles that govern the formation of contracts."¹⁵⁰ States "may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause "upon such grounds as exist at law or in equity for the revocation of any contract."¹⁵¹ "[C]ontract defenses, such as fraud, duress or unconscionability, may be applied to invalidate arbitration agreements."¹⁵² In general, these defenses have nothing to do with the actual disputes over whether a contract to arbitrate ought to be enforced. The fact that the agreement is imposed does not rise to the level of duress and in few cases is there any cause for fraud because the party seeking to require agreement to mandatory arbitration has no need to convince or cajole. They can merely impose. What these cases are about is generally unconscionability, but unconscionability requires that the conscience be shocked, and in the area of mandatory arbitration little is shocking anymore.¹⁵³

147. *Id.* at 1491.

148. *Id.*

149. H.R. REP. NO. 102-40(I), at 104 (1991).

150. *First Options of Chicago v. Kaplan*, 514 U.S. 938, 943 (1995).

151. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995) (quoting § 2 of the FAA).

152. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

153. The Ninth Circuit and the California Supreme Court have gone farther than any other courts in accepting these standard contract defenses to permit parties to avoid or restrict the scope of pre-dispute arbitration agreements. See *Engalla v. Permanente Med. Groups, Inc.*, 938 P.2d 903 (Cal. 1997) (refusal to compel arbitration of medical claims because of fraud in the inducement and waiver of the arbitration clause through dilatory

VI. CONCLUSION

Arbitration is an important form of dispute resolution and, given the costs of litigation, is likely for many parties to be the only viable option. Because it is a creature of contract, it can take many forms, some of which are calculated to insure that legal claims are effectively not enforceable. The reinterpretation of the FAA to apply to employment relationships outside of collective bargaining and to consumer transactions exposes parties to the imposition of such unfair arbitration procedures and makes probable a substantial change in the enforcement of the rights of those employees and consumers. Unlike those who have traditionally made extensive use of mandatory arbitration, such persons are unlikely to have significant ongoing relationships with the other side that would encourage fairness. They are also likely to be poorly positioned to protect themselves through bargaining. In fact, in most cases, they will not have the opportunity to bargain over these agreements at all.

The courts treat these arbitration agreements like other contracts and thus require the party resisting arbitration to carry the burden of demonstrating that the arbitration is inadequate to vindicate their rights. Because the courts have never articulated any standards for adequacy, this is a burden that is almost impossible to meet, especially if the claim involves questions like arbitrator bias. Together, these factors create powerful incentives for entities with market power to provide for arbitration that is likely to be one-sided and unfair.

Requiring the party who wishes to compel arbitration to demonstrate either that genuine bargaining occurred, or that the arbitral procedures provided for are equitable and calculated to vindicate the parties' legal rights will restore some balance to this area of the law. It will increase the chances that mandatory arbitration will be a useful form of dispute resolution and not a way for those with market power to avoid their substantive legal responsibilities.

tactics); *Nelson v. Cyprus Bagdad Copper Corp.*, 119 F.3d 756 (9th Cir. 1997); *Renteria v. Prudential Ins. Co. of America*, 113 F.3d 1104 (9th Cir. 1997); *Prudential Ins. Co. of America v. Lai*, 42 F.3d 1299 (9th Cir. 1993) (refusal to compel arbitration of civil rights claims because there was a non-knowing waiver). In the absence of either legislative change of the FAA or judicial shifting of the burden of proof on to the party seeking to compel arbitration, it is reasonable to expect that at least some of the Courts of Appeal will attempt to widen the scope of these contract defenses.